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The Honorable Gerald E. Connolly  
Chairman,  
Fairfax County Board of Supervisors  
12000 Government Center Parkway  
Suite 530  
Fairfax, VA 22035-0079

Dear Chairman Connolly:

I and others have had occasion to look at the DTB Design-Build Contract to the extent that the Metropolitan Washington Airport Authority (MWAA) posted it on its web site near the end of the day on 7 June, 2007. I thought, as a lawyer but also as a citizen of Fairfax County, I should send you a memorandum prepared which shows the unusual risks which are in the contract so far as the public has been able to see the contract. I don't wish to be an officious inter-meddler, but as a taxpayer in Fairfax County, I do think there is an interest for me calling the problems to the attention of the Board of Supervisors of Fairfax County so that you can make informed decisions and take appropriate actions as the project advances through the federal system.

"Take care...."

Sincerely,

William T. Coleman, Jr.  
Senior Partner and The Senior Counselor  
of O'MELVENY & MYERS LLP

WTC, Jr.:ses

Enclosure

## DULLES CORRIDOR METRORAIL PROJECT

Proposed DTP Design-Build Contract

Non-Standard Terms and Conditions

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### Overview

The proposed DTP Design-Build Contract which was negotiated by the Commonwealth and then the Metropolitan Washington Airport Authority (MWAA) without competition on a sole-source basis with Dulles Transit Partners (DTP) – a consortium of Bechtel and Washington Group International -- is not an advantageous contract for the taxpayer, Virginia governmental entities and toll payers who must pay for 100% of the contract costs and for any other final design and construction work.

The proposed DTP Design-Build Contract that was not posted on the MWAA web site until June 7, 2007<sup>1</sup> is full of non-standard provisions that will certainly drive the current Phase I Dulles Corridor Metrorail Project cost much higher than current disclosed budget of \$2.647 billion, including:

- Inappropriate secrecy provisions
- Award of the construction contract without a fixed-price
- Award of the construction contract prior to final design approval, without right to bid competitively the approved final design without penalty
- A supposed “fixed-price” portion of the contract which really is not a “fixed price,” instead by its written terms adjusting automatically to price changes of major construction items, e.g. steel and concrete
- Uncompetitive procurement procedures for future sub-contractor “allowance” work
- Award of utility relocation work under separate contract and without a fixed-price
- Loose provisions to control “differing site condition” costs
- “Concurrent Non-Project Activities” which are expected to be designed and built as part of the Project but have an unclear relationship to the proposed contract
- Provisions allowing the contractor to cause the conditions for its own Change Orders and Delays Claims that would increase cost to the taxpayer

These non-standard terms and conditions, addressed in detail below, are not found on competitively procured public construction contracts like the standard Washington Metropolitan Area Transit Authority (WMATA) construction contract noted here for comparison purposes. The standard WMATA construction contract -- which has provisions similar to those in other transit authority construction contracts -- was used to procure

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<sup>1</sup> [http://www.mwaa.com/dulles/about\\_dulles\\_international/2/about\\_dulles\\_international/dulles\\_corridor\\_proposal/p1contract](http://www.mwaa.com/dulles/about_dulles_international/2/about_dulles_international/dulles_corridor_proposal/p1contract)

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competitively and build the existing 106-mile metrorail system. There is no reason the standard WMATA form of construction contract could not be used for the Dulles Corridor Metrorail Project (even if awarded to DTP and administered by MWAA, the proposed "project sponsor") (perhaps not permitted by law).

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1) **Unprecedented Secrecy Provisions:** The secrecy provisions in the DTP 2004 Comprehensive Agreement (Article VIII of the Comprehensive Agreement) will apply under the proposed DTP Design-Build Contract (Article 12.1). These secrecy provisions are not allowed in a standard WMATA construction contract and are unprecedented in a public contract. The DTP 2004 Comprehensive Agreement establishes the following items as the "confidential," "proprietary," "trade secret," "property" of DTP:

- the fixed-price,
- the schedule and completion dates,
- escalation formula,
- itemization of the costs,
- quantity take-offs, and
- scope of work (among other items).

All these items are basic project information and are critical to the oversight and accountability of the proposed DTP Design-Build Contract and to the review and negotiation of Change Orders and other Claims. Even much more sensitive pricing documents are customarily subject to public disclosure under a public construction contract.

Under the proposed DTP-Design-Build Contract, only MWAA (which is not subject to standard Freedom of Information Act (FOIA) rules), not Fairfax County as a funding partner or the public, will have access to the information that DTP considers proprietary, confidential, or trade secret information. DTP will have the right to withhold that information, keep it secret, and, at the end of the job, destroy it.

2) **No Firm-Fixed-Price As Promised:** Under a standard WMATA construction contract, WMATA establishes a fixed-price for all of the construction work prior to construction contract award. The Virginia Department of Rail and Public Transportation (VDRPT) and MWAA however failed to produce a comprehensive firm-fixed-price for the whole construction job as previously publicly promised by public officials. The Phase I budget of \$2.647 billion merely becomes a floor, not the actual or ceiling, for further cost increases. To achieve only a partial fixed-price in a design-build contract is the worst of all worlds.

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- All pricing leverage is lost because the lead contractor is locked-in (i.e. locking out the competition and any mechanism to go out to bid later if contractor costs get out of hand during final design).
  - Potential conflict issues are exacerbated on a design-build contract without a comprehensive fixed-price since the contractor is both designer and builder (i.e. opening the opportunity for the contractor to “write his own ticket” for the items that are not fixed).
- 3) **Award of Construction Contract Prior to Final Design Approval:** The proposed DTP Design-Build Contract awards the prime construction contract to DTP (without a fixed-price) and does not allow MWAA to terminate the construction phase portion of the contract once the final design is approved (and subsequently competitively bid the approved final design) without a potentially significant penalty. Therefore, there is little leverage to control cost if the DTP’s contract price increases during the final design process.

Award of a construction contract prior to an approved final design is an inherent problem in any design-build contract but is exacerbated when the design-build contract has no fixed-price (as is the case of the proposed DTP Design-Build Contract here). This inherent design-build contract problem, however, can be addressed in a “progressive lump-sum” design-build contract like one planned for the “Norman Y. Mineta San Jose International Airport, Terminal Area Improvement Program Design-Build Project” where the public agency can cancel the construction phase of the design-build contract at the end of the final design phase (and competitively bid the construction phase work) if it does not accept the contractor’s lump-sum price proposal for construction of the approved final design.<sup>2</sup>

The need and rationale are unclear for awarding a construction contract (or a design-build contract) prior to an approved final design or a full funding grant agreement from the Federal Transit Administration (FTA) -- neither of which is expected prior to February 2008. The FTA does not require, nor does it customarily expect, an executed construction contract at this stage in the federal funding process. At this point all that is required in the federal funding process is a final design contract and an appropriately detailed cost estimate.

Award of construction contracts before complete and approved final design was also an area of serious problems in the “Big Dig” project, also a project in which Bechtel had quite a significant role. In the February 2003 report of the Massachusetts Office of the Inspector General (IG)<sup>3</sup>, the IG concluded (page 5) that “more than \$730 million in

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<sup>2</sup> See [http://www.sjc.org/about/Design\\_Build/briefing.pdf](http://www.sjc.org/about/Design_Build/briefing.pdf) for design-build “progressive lump-sum” contract approach.

<sup>3</sup> See <http://www.mass.gov/ig/publ/catglbrp.pdf>, Publication No. 18327-50-50-02/03-IGO.

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contract modifications were associated with construction contracts initiated prior to final design approval." Further, the IG found "many instances wherein cost overruns were related to design changes that should have been part of the original design."

- 4) **DTP Fixed-Price Work (Only Partial):** Under a standard WMATA construction contract, the contractor provides a fixed-price for all of the work and all the related costs associated with that work. The proposed DTP Design-Build Contract here, however, strongly provides a "fixed-price" for only \$1.075 billion (Exhibit 14.1.1) of the Phase I Project (less than 41% of the budget) and even then only some of the costs related to that fixed-price portion.
- This so-called "fixed-price" portion of the budget is not actually fixed-price and is far from customary. Normally under a fixed-price contract, a contractor is responsible for all related costs, including all material and equipment costs and any future related price increases.
  - Under the proposed DTP Design-Build Contract, the taxpayer is responsible for all material and equipment risk on the future prices of concrete, reinforcing steel, paving, fuel, and pre-cast concrete (among others), which will automatically change the "fixed-price" based on market fluctuations (Exhibit 14.1.3).
- 5) **DTP Allowance Work:** Under a standard WMATA construction contract, there is no provision for "allowance" work, i.e. all construction work is done under a fixed-price. The proposed DTP Design-Build Contract however leaves \$524 million in "allowances" out of the fixed-price for subcontracting by DTP at a future time -- including basic work such as trackwork, station work, pedestrian bridges, site development, elevators and escalators, communications and security, power systems, and bonds and insurance, among other major items (Exhibit 14.1.1).
- Under the proposed DTP Design-Build Contract, the taxpayer must take all the risk on the all costs associated with such "allowance" work going forward.
  - While required to "procure" bids for this "allowance" work from subcontractors, DTP is only required to have two (2) sub-contractor bidders (Article 12.2.2) which DTP gets to choose as long as the sub-contractor meets qualifying criteria. DTP is further given what is effectively a unilateral right to award the "allowance" work to whichever subcontractor it recommends, regardless of bid price. MWAA may only object to DTP's recommendation on grounds of "procedures," Exhibit 14.1.6(b).C(3), and must resolve any disagreement within seven (7) days by negotiation only.
  - DTP is not required to procure the "allowance" work on fixed-price basis (i.e. this work can be procured on a "time-and-materials" basis) nor is there any prohibition from using subcontractors who might be working under the "fixed-price" portion

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of the proposed DTP Design-Build Contract. Allowing a subcontractor to work on “both sides” of the contract could at the least confuse cost tracking oversight and at the worst create avenues to “game” contractor pricing to the taxpayers’ disadvantage.

There is really a large incentive for DTP to increase the Project cost here. Under the proposed DTP Design-Build Contract,

- DTP’s fees increase with higher subcontractor prices for the “allowance” work (up to a limit redacted from the publicly available contract, Article 14.1.6(d)) and
- DTP has the right to make a Delay Claim if the subcontractor’s schedule for “allowance” work causes DTP’s existing critical path schedule to be longer, and further to make such Delay Claim even if the critical path delay is just on “paper” rather than an actual one (Article 13.3.3(2)).

6) **DTP Utility Relocation Work:** Under a standard WMATA construction contract, the contractor is responsible for undertaking utility investigations and utility work as part of the fixed-price construction contract for the project. The proposed DTP Design-Build Contract however only identifies \$128 million for utility relocation work (Exhibit 14.1.1) and does not include it in DTP’s fixed-price or under the DTP Design-Build Contract. DTP will manage, design, coordinate, build, and procure the utility relocation work under separate amendment to the DTP 2004 Comprehensive Agreement (Article 7.1.2) – amendment not provided to the public.

- The terms and conditions of DTP’s utility relocation work are not yet disclosed. Is this work being done on a time and materials basis without a fixed-price and possibly subcontracted to a different contractor?
- Much of this utility relocation work is on the critical path of the Project since it is the first work on the project schedule (utility work is scheduled to start August 2007 prior to expected start of the design-build construction in February 2008). There is a large incentive for DTP to delay the Project schedule and make related Delay Claims since the taxpayer must pay for all utility relocation delays to the design-build work beyond a thirty (30) day critical path delay (Article 13.6) – even for those delays of DTP’s own making. DTP can thus, under separate agreement, generate the basis of its own Delay Claims to the proposed DTP Design-Build Contract.
- There is also the potential conflict that the design and construction of the “utility relocation work” will both directly impact and be impacted by the final design and construction of the “work under the proposed DTP Design-Build Contract.” Again, this is another potential mechanism for DTP to generate the basis for its

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own Change Orders and Delay Claims under the proposed DTP Design-Build Contract.

- 7) **Differing Site Conditions:** Under a standard WMATA construction contract, when a “differing site condition” is found, work must stop and the WMATA Contracting Officer must investigate that “differing site condition” before work in that area can proceed again. The proposed DTP Design-Build Contract however, after a “differing site condition” is found, allows DTP to proceed with work in the “differing site condition” area (possibly eliminating the characteristics or evidence of the “differing site condition”) on the second business day of written notice to the MWAA Contracting Officer, whether or not the MWAA Contracting Officer has seen the “differing site condition” or not.

Also under the proposed DTP Design-Build Contract, DTP is only responsible for up to \$6 million of additional costs associated with what are define as “differing site conditions,” taxpayers have to pay all the rest. DTP also has the ability under the proposed DTP Design-Build Contract to assert that site conditions “known” by DTP can nevertheless be considered “differing site conditions” based solely on the “extent of the condition.” While “differing site conditions” provisions are a customary part of any construction contract, the way the proposed DTP Design-Build Contract is written materially lowers the threshold that DTP must meet to make and argue for Change Orders and Delay Claims. Please note once again Bechtel’s heavy involvement in such Project.

“Differing site conditions” was also an area of serious problems in the “Big Dig” project. A February 2003 report of the Massachusetts Office of the Inspector General (IG), the IG concluded that “\$357 million in cost overruns were incurred due to unexpected ‘differing site conditions’” and that “in many cases, the categorization of cost overruns as ‘differing site conditions’ has been used by B/PB [Bechtel/Parson Brinkerhoff] as a cover story for its failure to perform its contractually obligated duties to assess site conditions during the design stage.”

- 8) **“Concurrent Non-Project Activities”:** There are approximately \$224.9 million of Project items that have been labeled by MWAA as “concurrent non-project activities,” such as Route 7 improvements (\$73.7 million); passenger service items such as escalators at all level changes, WMATA standard pedestrian bridge widths, and redundant elevators (\$27.3 million); bus bays and pedestrian bridges at Wiehle Station (\$11.3 million); Tysons 123 station mezzanine improvements (\$10.9 million); among numerous other items.
- Most of these items are in fact integral Phase I Project work that is part and parcel of the NEPA environmental approvals and Fairfax County approvals of the Phase I Project and are expected by Fairfax County to be included in the proposed DTP Design-Build Contract.

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- It is not clear from any written document made public what relationship the “concurrent non-project activities” have to the proposed DTP Design-Build Contract and the Contract Price (Exhibit 14.1.1) and whether they represent potential Change Orders, even before the Contract is signed, with undetermined changes to the proposed Contract Price and Schedule.

### Other Contract Issues

- 1) **Davis-Bacon Requirements:** The proposed DTP Design-Build Contract requires DTP to conform to the Davis-Bacon Act (Exhibit 3.3.15 (12)) with a restated clause 29 CFR § 5.5(b) (requiring at least 1.5x wages for hours beyond a 40 hour workweek, among other items). Davis-Bacon provisions are expected when federal transit funds are involved, but they effectively undermine the Commonwealth of Virginia’s Right to Work law by requiring all contractors and subcontractors, union and non-union alike, to submit to rigid job classifications, work rules, and wage rates that are, in reality, union-dictated. The huge volume of paperwork and other compliance costs required of employers by Davis-Bacon often deters non-union firms from submitting bids. Of course, the firms that do participate in Davis-Bacon projects ultimately pass on most of their compliance costs to taxpayers and the public entities. While Davis-Bacon requirements are part of a standard WMATA construction contract, non-union workers and non-union subcontractors worked on WMATA jobs as long as they observed Davis-Bacon requirements.
- 2) **Virginia Right-To-Work Issues:** Notwithstanding the Davis-Bacon requirements noted above, DTP does not appear to be contractually required in the proposed DTP Design-Build Contract to run the job “open shop” allowing non-union workers to work on the Project, consistent with the Commonwealth of Virginia’s Right to Work laws, or to allow non-union subcontractors to bid on the “allowance” work on the Project. DTP is also said to be planning to run the project on a “union only” basis. Note that the Commonwealth of Virginia is a Right to Work state, meaning it has laws that allow workers to unionize, but forbids the union to have a union shop (make membership in the union local mandatory for that job class); qualified non-union workers have the Right to Work alongside of unionized workers.